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No. 82-1234

IN THE

Supreme Court of the United States

October Term, 1982

JAMES PARKER, Individually and as Administrator of the Estate of JAY PARKER and SHIRLEY PARKER, Individually and as Mother and natural Guardian of JAY PARKER,

Petitioners,

against

THE COUNTY OF NASSAU, THE NASSAU COUNTY POLICE DEPARTMENT, OFFICER DENNIS BOYLE and OFFICER JOHN TALT,

Respondents.

Brief for Respondents in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Opinions in the Courts Below.

The memorandum and order of the District Court, which is not reported, is set out in petitioners' appendix, pages 15A-17A. The judgment dismissing the complaint is reproduced at pages 18A and 19A. The order of the Court of Appeals affirming the judgment which is not reported is set out in petitioners' appendix, pages 20A-23A.

Jurisdictional Statement.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented for the Court to Review.

Whether the Court of Appeals for the Second Circuit erred in affirming the District Court's dismissal of the complaint as to defendants, County of Nassau and John Falt, at the close of the evidence, and as to defendant Boyle following a special jury verdict.

Whether the Court of Appeals erred in affirming the District Court's use of a form of special verdict.

Whether the Court of Appeals erred in affirming the District Court's order quashing a *subpoena duces tecum* for the production of the F.B.I. file regarding its investigation into the death of Jay Parker.

Statutes and Regulations Involved.

The pertinent provisions of the statutes involved include 42 U.S.C. §1981, which is set forth at page 3 of petition; 42 U.S.C. §1983, set forth at page 4 of petition; 28 C.F.R., Part 16, Sections 16.21, 16.22 and 16.24 set forth at pages 1A-14A of petitioners' appendix.

Statement of the Case.

Petitioners brought an action under 42 U.S.C. Sec. 1983 for damages arising out of an incident which took place on February 9, 1980. The summons and verified complaint in the action were served on or about February 19, 1981. The

verified answer was served on behalf of defendants on or about April 23, 1981.

The trial took place before the Honorable George C. Pratt on April 5-April 13, 1982, before the United States District Court for the Eastern District of New York.

At the end of petitioners' case, the action was dismissed as to respondents Talt and Nassau County on the ground that petitioners had failed to make out a *prima facie* case against them. A jury verdict was thereinafter rendered in favor of respondent Boyle. Judge Pratt therefore directed the clerk to enter judgment dismissing the complaint. Judgment was entered ordering and adjudging that the plaintiff take nothing of the defendants and dismissing the case against all defendants.

A notice of appeal was filed on behalf of petitioners as to the order dismissing the complaint against defendants Talt and Nassau County and from the order entered on the jury verdict in favor of defendant Boyle. No notice of appeal was ever filed by petitioners from the judgment of the Clerk of the Court filed on April 22, 1982.

The United States Court of Appeals for the Second Circuit affirmed the determination of the District Court in an order filed October 21, 1982. The order was signed by the Honorable Ellsworth A. Van Graafeiland, Circuit Judge, the Honorable Lawrence W. Pierce, Circuit Judge, and the Honorable Inzer B. Wyatt, District Judge of the Southern District of New York sitting by designation.

The relevant events that took place on the evening of February 9, 1980, are as follows. The decedent, Jay Parker, and a friend, Neal Bell, went to the Green Acres

Shopping Mall in Valley Stream, Long Island. After the two arrived at the Mall, Bell walked over to a white youth and demanded money. The white youth, one Michael Barkolas, refused to give him money and walked off. When he again saw Neal Bell, Barkolas was with friends. Bell again asked for money and, while he did this, Parker displayed his gun. Parker told the boys it was a real gun. Parker and Bell left and the police subsequently arrived, having been summoned to the scene. Barkolas also testified that he and his friends told the police officers that they in fact believed the gun was real.

The four youths got into the car and went to look for the two boys. They pointed them out to the police and Barkolas indicated the tall one (Parker) had the gun. The youths were told to put their hands on the car. Bell complied, Parker did not, he kept his hands in his pockets. Officer Boyle told Parker a minimum of three times to take his hands out of his pockets and put them on the car. Officer Boyle had his hand on Parker's shoulder at that time. Officer Boyle then saw Parker with the gun in his hand, turning toward him. Officer Boyle believed Parker was turning to shoot him. Boyle then fired his gun and, when he saw Parker still coming, fired a second time. Medical assistance was summoned. Detective Ferucci responded to the scene. Jay Parker was taken to Franklin General, the nearest hospital. Jay Parker was pronounced dead at Franklin General Hospital and an autopsy was thereafter performed by the Office of the Medical Examiner, County of Nassau.

ARGUMENT.

Petitioners failed to demonstrate a deprivation of any constitutional rights secured by the constitution and laws.

It is contended by the petitioners that certain rulings by the District Judge in the case at bar as upheld by the Second Circuit give rise to important questions of Federal law which petitioners assert had the cumulative effect of depriving the petitioners of a fair hearing by the jury.

Respondents respectfully submit that petitioners had a fair hearing by the jury and the rulings by the District Court Judge as upheld by the Second Circuit were correct as a mattter of law.

I.

The decision below is clearly correct.

The respondents respectfully submit that the decision of the Court below is clearly correct. The United States Court of Appeals for the Second Circuit took into account *all* of the arguments raised in the petition herein (as well as other contentions of the petitioners), and found them to be without merit. Importantly, the Circuit Judges, Hon. Ellsworth A. Van Graafeiland, Hon. Lawrence W. Pierce, and Hon. Inzer B. Wyatt, found there was a complete failure of proof on the issue that petitioners have raised, to wit, that the alleged torts were committed pursuant to some official policy or resulted from grossly negligent or deliberately indifferent lack of training. Furthermore, Officer Talt did not participate in the shooting, therefore, the case was properly dismissed as to him. The Circuit Judges

similarly disposed of petitioners' other arguments, affirming in all particulars the determination of the District Court and the jury.

The District Court was correct in dismissing the case as to defendants Talt and Nassau County as a *prima facie* case had not been made as to them.

At the close of the evidence, attorney for the respondents made a motion for a directed verdict. The trial court granted the motion as to defendants Talt and Nassau County. Respondents submit that this was proper under the law as a prima facie case had not been made as to them.

The case of *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658 (1978), is the landmark case dealing with the liability of municipalities under 42 U.S.C. Sec. 1983. The *Monell* case held, in substance, that municipalities are "persons" subject to liability under Sec. 1983 and may be sued for constitutional deprivations visited pursuant to governmental "custom," even where such custom has not received formal approval, as well as policy statements, ordinances, regulations or decisions officially adopted by the municipalities' officers. However, it is important to note that the holding in *Monell* provided that a municipality can not be held liable solely because it employs a tort-feasor, i.e., on a *respondeat superior* theory. Furthermore, a municipality can not be sued for an injury inflicted by an employee. It is only when the execution of a governmental policy inflicts injury that a municipality is liable.

The *Monell* case, *inter alia*, involved a claim that the Board of Education and the City of New York had made it

a matter of official policy to compel pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons, thus depriving the petitioners of their federally protected rights.

Applying the facts of the within case to the standards set forth in *Monell,* it can be determined that the County of Nassau could only be held liable, as a "person" subject to liability under Sec. 1983, if Officer Boyle shot Jay Parker in the execution of a policy or custom of the County of Nassau. The County could not be held in the case on a *respondeat superior* basis, i.e., that the police officer is an alleged tort-feasor. In this context, petitioners would have to show that there was a policy on the part of the County of Nassau to promote shooting black people, or to promote vigilant acts on the part of police officers with regard to black people. There is not even a *hint* of policy such as this, much less evidence to prove such a policy exists. Therefore, petitioners must fail under the *Monell* standards.

This Honorable Court further clarified the liability of municipalities in a 1983 action in the case of *Turpin v. Mailet,* 579 F. 2d 152 (2d Cir. 1978), *cert. den.* 439 U.S. 988, v. 439 U.S. 974, m. 591 F. 2d 426 (1979), 619 F. 2d 196 (2d Cir., 1980), *cert. den.* 449 U.S. 1016 (1980).

The *Turpin v. Mailet* case involved a claim against a municipality based on an allegation that the board of police commissioners had previously acted in such a way as to encourage expression of feelings of hostility against that particular plaintiff by reason of his previous altercations with the police. Such a situation is not true in the within case. There is nothing in the record to indicate any previous altercations with the Police Department of the

County of Nassau, much less any form of hostility encouraged by the Police Department of Nassau County, toward Jay Parker.

In the case of *Owens v. Haas*, 601 F. 2d 1242 (2d Cir., 1979), the Second Circuit held that the case should not have been dismissed at the *pleadings* stage. In remanding the case back to the District Court for further discovery, to elicit the facts, the Second Circuit held that a "* * * failure to train or supervise law enforcement officers must be so grossly negligent as to constitute 'deliberate indifference' in order to hold the County liable."

In the within case, there is absolutely no evidence in the record before the Court that would indicate that the County had exhibited "deliberate indifference" or "gross negligence" within the meaning of *Owens v. Haas*. In fact, Officer Boyle testified that he was on the police force some 18 years and had received training at the range in the use of weapons. Officer Boyle testified that this was the first use he had ever made of his weapon in his years on the police force. Officer Boyle also testified that he had been trained to take cover. Officer Boyle further testified that he believed Jay Parker was going to shoot him when he saw the gun in Jay Parker's hand.

The expert who testified on behalf of the petitioners, Ronald W. Hill, a New York City Police Officer assigned to the Police Academy of Fire Arms and Tactics, for the City of New York, testified that he uses the following six guidelines in instructing police officers at the Police Academy:

> "1. Use all reasonable means before utilizing firearm when effecting arrest for or preventing or terminating a felony or defending self or another.

"2. Do not fire warning shots.

"3. Do not discharge firearm to summon assistance except when safety is endangered.

"4. Do not discharge firearm from or at moving vehicle unless occupants are using deadly, physical force against officer or another, by means other than vehicles.

"5. Do not discharge firearm at dogs or other animals unless there is no other way to bring animal under control.

"6. Do not discharge firearm if innocent persons may be endangered."

It cannot be said that Officer Boyle acted in contravention of any of the guidelines specified by the petitioners' expert.

Furthermore, there is absolutely no evidence in this case that Officer Talt engaged in any breach of the decedent Parker's constitutional rights. By Officer Boyle's own admission, he fired the shots that resulted in Jay Parker's death. In fact, counsel so stipulated to that fact. Furthermore, the allegations by petitioners that Officers Talt and Boyle "wrongfully and illegally entered the County of Queens" are meaningless. Police officers of the County of Nassau may effectuate an arrest anywhere within the State of New York when said police officers have reasonable cause to believe a person has committed a crime. Both attempted robbery and unlawful possession of a gun are "crimes" requiring that a police officer go over the county border. There appears to be no argument on that point.

The trial court may properly grant a motion to dismiss at the close of the evidence where there is such a complete absence of evidence supporting the verdict that any result in favor of petitioners could only be the result of surmise, and conjecture. *Mattivi v. South African Marine Corp., "Huguenot,"* 618 F. 2d 163 (2d Cir., 1980). Respondents submit that such is true in the case at bar.

The holding set forth in the case of *Whitehurst v. Wright,* 592 F. 2d 834 (5th Cir., 1979), is applicable to the case at bar. In the *Whitehurst* case, an action was brought under the civil rights statutes by the decedent's mother on a claim that an alleged cover-up deprived her son of his constitutional rights. A directed verdict was granted for the defendant mayor and a jury verdict for the other defendants. In that case, evidence showed that the decedent was gunned down by a police officer who mistook him for a suspect in a robbery. The police officer claimed that the decedent shot first. None of the officers at the scene found a gun near the body, however, a detective subsequently called to the scene spotted a gun twenty-seven inches from the victim. It was later discovered the gun had been confiscated by the police in a drug raid one year prior to the shooting. The entire event precipitated the resignation of several officials of the City and several police officers. In spite of the blatant nature of the cover-up allegations, the 5th Circuit held that:

> "The trial court correctly ruled that the events occurring *post obitum* could form no part of the deceased's 42 U.S.C. Sec 1983 or Sec 1985 action. The essence of a claim under either section is the deprivation of a *person's* constitutional rights. Here, the events of the alleged cover-up took place after Bernard Whitehurst had been shot and killed" (592 F. 2d 834, 840).

The Court is also respectfully referred to the case of *Roe v. Wade*, 410 U.S. 113 (1973), wherein the Supreme Court held that a fetus is not a "person" within the meaning of the 14th amendment. Therefore, if a fetus who is capable of sustaining life in the future is not a considered "person," it follows that a corpse certainly cannot be considered a "person" with constitutional rights. After death, one is no longer a "person" within our statutory and constitutional framework and has no rights to which he may be deprived.

In the within case, the bald assertions of petitioners that there was a "cover-up" certainly do not even rise to the level of the *Whitehurst* case. The "cover-up" consisted of the fact that petitioners felt Jay Parker should have been brought to a New York City hospital since he was shot in New York City. The evidence conclusively showed that there were New York City police officers on the scene. However, no New York City ambulance had arrived, though the New York City ambulance had been summoned. Therefore, the Nassau County ambulance brought Jay Parker to the closest hospital, to wit, Franklin General Hospital, to give the boy every chance for survival. Furthermore, pursuant to law, an emergency medical technician may not pronounce a person dead even if there virtually was no question as to his condition. Since the death took place in Nassau County, an autopsy was performed there. However, since the incident took place in New York City, a Queens County Grand Jury convened to deal with the case. So where is the "cover-up"? Obviously, none exists; and even assuming, *arguendo*, there was a "cover-up", it would be *after* the fact and the Sec. 1983 action would fail as in the *Whitehurst* case.

This honorable Court is further referred to the decision of District Court Judge Kevin Thomas Duffy in the case of

Whitley v. City of New York, 518 F. Supp. 1318 (S.D.N.Y., 1981), wherein the court granted defendant City's motion for summary judgment holding that:

> "Whether Spooner was negligent in discharging his gun or committed intentional assault is an entirely separate matter for which conduct the City cannot be held liable under Sec 1983" (518 F. Supp 1318, 1321).

Certainly, in the within case, petitioners were given every opportunity to prove their case since the motion to dismiss as to defendants Talt and Nassau County was granted at the close of the evidence. Therefore, the determination of the trial judge should be upheld.

The question submitted to the jury in the form of a special verdict was proper in all respects.

Respondents respectfully submit that the question given to the jury was proper in all respects. Furthermore, the contention raised in the petition, to wit, that the question submitted to the jury in the form of a special verdict was an improper restriction of the issues requiring review by this Honorable Court, is merely appellate afterthought and nothing more.

In accordance with the law, Judge Pratt asked the jury to determine the following:

> "In short, you have heard the evidence, you have heard the arguments of counsel. What you have to determine in light of these instructions is whether the defendant Boyle reasonable believed that shooting Jay Parker was necessary to protect

himself or others from the imminent use of deadly force, and your answer to that question, you will report as either yes or no in the form of special verdicts which I will provide to you."

What petitioners fail to point out in their brief is that the question presented to the jury was given after the trial judge gave instructions on the law which comprised some thirty pages in the record. The jury was carefully instructed that the burden of proof with respect to the question rests upon Boyle, to show, by a fair preponderance of the credible evidence, that the claim he asserted is true. Furthermore, the jury was charged at length, using the language of the applicable statutes.

In the case of *Leathers v. United States,* 352 F. Supp. 1244 (E.D. Ark., 1971), the District Court Judge used special interrogatories. A motion was made by the defendant government for judgments notwithstanding the verdict, or alternatively for a new trial. The trial judge denied the motions and the case was thereafter affirmed by the Court of Appeals, 471 F. 2d 856 (8th Cir., 1972), *cert. den.* 412 U.S. 932 (1973).

In the case at bar, no motions or exceptions were taken by the petitioners' attorney during the trial. Similarly, petitioners' attorney made no motions after trial though the trial judge asked if there were any motions. Therefore, any complaint made by petitioners at this time is strictly appellate afterthought. In fact, the trial judge asked to see counsel at side bar *before* he sent the jury in for their deliberations. At side bar, the trial judge gave a copy of the special verdict to petitioners' attorney and asked if there were any additional requests or exceptions. No exceptions were taken. The only exception taken at that time

was by respondents, and that was in regard to the statutory definitions of a crime.

Furthermore, from his opening remarks to the jury, the trial judge indicated to counsel and the jury the nature of the case as he saw it and never once did the petitioners object. Any objections petitioners' attorney may raise at appellate level are too late, where no objections were raised in the Court below.

Petitioners also contend that "* * * the jury was not permitted to consider whether Boyle was negligent in failing to take cover, as his partner did, or in the manner in which he placed Jay Parker under control." This language and other language in the petition constitutes an attempt by petitioners' counsel to use negligence as the basis for a civil rights action. A cause of action under a civil rights statute is available to any person who under color of state law is deprived of a right, privilege or immunity secured by the constitution or federal law (see *Whitley v. City of New York, supra*). Negligence may not be a basis for a civil rights action. In fact negligence was not a basis for *any* cause of action specified in the verified complaint.

Indeed, the doctrine of pendent jurisdiction permits state causes of action to be tried in federal court, where there is a sufficient nexus to a federal cause of action. However, a litigant may not "piggyback" his state claims onto an unsuccessful federal claim.

Furthermore, the arguments set forth by petitioners are in effect duplicitous. On the one hand, petitioners claim the County did not train their police officers properly. On the other hand, petitioners state that Officer Boyle acted negligently in not taking cover, which is what he was

trained to do. Either argument must fail for the following reasons. To succeed in a 1983 action, a litigant must establish gross negligence at the very least. This had not been proven in the within case. Furthermore, any alleged negligence on the part of Officer Boyle is irrelevant to the within civil rights action.

In summation, the crux of the issue, the central issue, the only issue to be determined by the jury was set forth properly in the charge and should not be disturbed. To put it another way, Officer Boyle shot and killed Jay Parker, that much is given. It is then up to Officer Boyle to prove his claim that he reasonably believed that shooting Jay Parker was necessary to protect himself or others from the imminent use of deadly force. The jury determined rightfully that Officer Boyle reasonably believed the shooting was in fact necessary and their determination should be upheld.

The holding in the case of *R. H. Baker & Co. v. Smith-Blair, Inc.*, 331 F. 2d 506 (9th Cir., 1964), is directly on point as regards to this issue. The case holds in pertinent part:

> "Appellants proposed an instruction that changes in 'form' as distinguished from those of 'substance' or 'principle' were unimportant in determining infringement. Assuming the instruction was otherwise unobjectionable, the court properly concluded that it was inappropriate since in this case the jury was not asked to determine the broad issue of infringement as such, and the instruction was not necessary to an understanding of the specific questions which the jury was asked to answer. Appellants' proposed instruction as to the

> doctrine of equivalency was properly refused for the same reason. 'Use of the special verdict eliminates the necessity for and use of complicated instructions on the law, which are a normal concomitant of the general verdict'. 5 Moore's Federal Practice 2207 (2d ed. 1951)" (331 F. 2d 506, 511).

It is clear that the question submitted to the jury in the form of a special verdict was proper in all respects. The jury rightfully determined that Officer Boyle reasonably believed the shooting was necessary to protect himself or others from the imminent use of deadly force, and their determination should be upheld.

The trial court did not commit reversible error in quashing petitioners' *subpoena duces tecum* for the production of the F.B.I. file regarding its investigation into the death of Jay Parker.

Subsequent to the shooting of Jay Parker, the Federal Bureau of Investigation and Department of Justice conducted an investigation to ascertain whether decedent's civil rights had in fact been violated. Petitioners brought by order to show cause a motion to compel the production of the entire F.B.I. file. Respondents were never served with the order to show cause; though it was specified that they be served in the order to show cause. Petitioners thereafter served a *subpoena duces tecum* to produce the entire F.B.I. investigation file. Again, respondents were never advised of this request. However, the Assistant U.S. Attorney appeared and moved to quash the subpoena.

The court chose not to address the technical argument that the Assistant U.S. Attorney was not the proper subject of a *subpoena*. The judge instead chose to address the substantive argument that was made based upon 28 CFR

16.21, a regulation established by the Justice Department. The regulation places the matter in the government's discretion as to whether or not they will respond to *subpoena.* In the case of *United States v. Ragen,* 340 U.S. 462 (1951), the Supreme Court upheld the validity of the government making internal regulations respecting disclosure. The court was informed that the materials requested by the petitioners contained statements of witnesses and 302 interview reports prepared by F.B.I. agents. The F.B.I. voluntariy disclosed that there were no statements or interviews of the individual defendants in the file.

The primary issues raised by the government included the breadth of the *subpoena,* the quantity of documents and problems related to an informer's privilege. None of the material would be directly admissible. The material sought could only be used on credibility issues and the witnesses had already testified at examinations before trial, in the grand jury and during pre-trial.

Furthermore, it appears clear that the requested information would not be available under the Freedom of Information Law. The standing of one who seeks access to records is a member of the public, and his position is not enhanced because he is a litigant or potential litigant. In the recent decision of *FBI v. Abramson,* ____ US ____, 72 L. Ed 2d 376 (1982), the Supreme Court held that Exemption 7 of the Freedom of Information Act (5 USC 552 [b] [7]) also exempts information originally contained in law enforcement records and thereafter incorporated into a document not compiled for law enforcement purposes.

Petitioners' attempt to persuade this court that the main reason the trial judge denied the motion was that it came

on very late. This is not the case in any respect. Judge Pratt specifically stated that the other factors were adequate to warrant denial of the motion. The trial judge gave a rather lengthy and complete discussion on why he had denied petitioners' request.

In short, the trial judge properly granted the motion to quash the *subpoena* and his determination was properly upheld by the United States Court of Appeals.

II.

There is no conflict of decision.

Respondents respectfully submit that there is no conflict of decision in the within case. All of the cases set forth in petitioners' brief, be they from the Circuit Courts, the District Courts or this Honorable Court, all point to the same standards in determining whether an individual's constitutional rights have been violated.

It must be emphasized that the District Court and the Second Circuit applied the necessary law and found that, in this case, there had been a complete failure of proof as to the County and Officer Talt. The transcript in the within case bears out this fact. Furthermore, the jury verdict in favor of Officer Boyle was correct.

For the reasons set forth above, none of the rulings of the District Court Judge "give rise to important questions of Federal Law," as petitioners allege in their petition.

III.

There is no substantial question of constitutional dimension.

Clearly, the attempt by petitioners to couch their petition in terms of a violation of the United States Constitution is without merit. As set forth above, there are no issues herein which necessitate review by this Court. All of the arguments are merely a restatement of the arguments presented to the Second Circuit. Those arguments were rejected by the United States Court of Appeals for the Second Circuit. Therefore, the respondents submit that the determinations of the District Court affirmed by the United States Court of Appeals for the Second Circuit are in accordance with the controlling principles of Federal Law.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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